STATE OF MICHIGAN

COURT OF APPEALS

STANLEY M. KOSMALSKI and WILMA J. KOSMALSKI,

Plaintiffs/Counterdefendants-Appellants,

v

GEORGE WILLARD and JUANITA WILLARD,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees,

and

P.G. PITCHFORD and GUARANTY SURVEY COMPANY,

Third-Party Defendants.

UNPUBLISHED
September 23, 2004

No. 247697
Oakland Circuit Court
LC No 01-035447-CZ

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Plaintiffs/counterdefendants, Stanley M. Kosmalski and Wilma J. Kosmalski ("plaintiffs") appeal as of right from a trial court order granting summary disposition to defendants/counterplaintiffs, George Willard and Juanita Willard ("defendants"). We affirm.

This case concerns the boundary line between adjoining lakefront lots 45 and 46 on Union Lake in West Bloomfield Township. Defendants own lot 46, and plaintiffs own lot 45. Lake Street was a public alley that provided lakefront access for the fire department before fire hydrants were installed. In 1953, Lake Street was vacated and split into halves. One half was included in lot 45, and the other half was included in lot 46. The fire department retained an easement over the entire vacated Lake Street.

In April 1984, Carolyn and John Kress acquired lot 46. During 1984 and 1985, the Kresses constructed a wooden deck over an existing stone patio, which had been built during the 1950s on the vacated half of Lake Street that became part of lot 46. The deck extended almost to the line that defendants contend is the boundary line between the two lots. According to the

Kresses, they and Gary Moss, who had acquired lot 45 in August 1979, "always treated the deck as being wholly within Lot 46."

In 1993, Moss sold lot 45, which is vacant, to plaintiffs, who reside in a house on lot 44. In 1997, plaintiffs installed a new seawall directly over the preexisting seawall on lot 45. In connection with construction of the seawall, a new survey was conducted, and the parties learned that the Kresses' deck extended twelve to fifteen inches over the boundary line onto lot 45. According to the Kresses, Mr. Kosmalski declined their offer to cut off the edge of their deck because he could not use the land. At the meeting point between the seawalls, plaintiffs installed an "arm" or "elbow," which extends landward at a ninety degree angle for several feet. Defendants contend that the boundary line extends along this "arm" or "elbow" to the deeded boundary point at the street.

In 1998, the Kresses sold lot 46 to defendants, who reside in a house on it. Defendants allege that, around the time of the sale, a relative of plaintiffs approached Mr. Kress and stated that eight inches of the deck extended onto lot 45. Defendant's real estate agent spoke to the Kresses, who stated that it was not a problem because of Mr. Kosmalski's earlier rejection of their offer to cut off the tip of the deck. For three years, there was no discussion about the boundary line. In June 2001, defendants received a letter from plaintiffs' attorney, who stated that the deck encroached eight feet onto plaintiffs' property. Defendants refused to sign the enclosed license agreement, and plaintiffs initiated the instant lawsuit.

Plaintiffs filed a complaint asserting claims in trespass and nuisance and alleging that defendants' deck encroached onto lot 45 by eight feet. Defendants denied plaintiffs' allegations and filed a countercomplaint for quiet title. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the parties and their predecessors in interest had acquiesced to a boundary line defined by the meeting point between the two seawalls for a period exceeding fifteen years. The trial court granted defendants' motion, finding that defendants had established acquiescence in such a boundary for the necessary period, and that plaintiffs had failed to present any evidence to create a question of fact as to such acquiescence. Thereafter, plaintiffs moved for reconsideration, which was denied by the trial court.

Plaintiffs first argue that the trial court erred in granting defendants' motion for summary disposition because genuine issues of material fact remain regarding whether the parties acquiesced in any particular property line. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). We also review de novo actions to quiet title, which are equitable in nature. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001); *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996).

In deciding a motion for summary disposition under MCR 2.116(C)(10), a court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted to determine whether a genuine issue of material fact exists. *Spiek, supra* at 337; *Rice, supra* at 30-31. The existence of a disputed fact must be determined by admissible evidence proffered in opposition to the motion. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). Summary disposition is appropriate where the

proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra, supra* at 164, *Rice, supra* at 31.

There are three legal theories by which acquiescence to a boundary other than the deeded property line, can occur: (1) acquiescence for the statutorily-prescribed period of more than fifteen years; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from an intention to deed to a marked boundary. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Where adjoining property owners acquiesce to a boundary line for more than the statutorily required fifteen years, that line becomes the actual, legal boundary line between their properties regardless of subsequent surveys or later conduct of the parties to disavow it. MCL 600.5801(4); *Johnson v Squires*, 344 Mich 687, 692-693; 75 NW2d 45 (1956); *Killips, supra* at 260. The acquiescence of predecessors in title may be tacked onto that of the parties on order to establish the required fifteen-year period. *Killips, supra* at 260. See also *Jackson v Deemar*, 373 Mich 22, 25; 127 NW2d 856 (1964). As observed by the Michigan Supreme Court:

> "It has been repeatedly held by this Court that a boundary line long treated and acquiesced in as the true line, ought not to be disturbed on new surveys. Fifteen years' recognition and acquiescence are ample for this purpose and, in view of the great difficulties which often attend the effort to ascertain where the original monuments were planted, the peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged." [*Johnson, supra* at 692-693, quoting *Dupont v Starring*, 42 Mich 492, 494; 4 NW 190 (1880) (citations omitted).]

In support of their motion for summary disposition, defendants presented ample evidence: the Kresses' affidavit, plaintiffs' 1997 seawall permit application, photographs, and the June 2001 letter from plaintiffs' attorney to defendants. The stone patio on lot 46 and the seawalls on lots 45 and 46 were present when the Kresses acquired lot 46 in April 1984. It is undisputed that the seawalls have been in the same location for more than fifteen years and that Moss and the Kresses treated the meeting point of the seawalls as the boundary since 1984. In 1997, plaintiffs installed a new seawall on lot 45 directly over the preexisting one, and it extends to precisely the point that defendants assert is the boundary line between the properties. Moreover, the "arm" or "elbow" of plaintiffs' new seawall extends landward several feet exactly along the boundary line asserted by defendants. Furthermore, when plaintiffs applied for the permit to build the new seawall, they included a drawing that depicts the meeting point between the seawalls as the boundary line. Plaintiffs took no affirmative action relating to the boundary line until June 2001. We find that this evidence was sufficient to establish the necessary period of acquiescence from April 1984 until June 2001. Therefore, the burden then shifted to plaintiffs, as the party opposing the motion for summary disposition, to establish that a genuine issue of disputed fact exists. Because plaintiffs failed to present documentary evidence opposing defendants' motion for summary disposition, the motion was properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

On appeal, plaintiffs assert that affidavits and documents attached to their motion for reconsideration[1] established a genuine issue of fact with regard to acquiescence. In reviewing the trial court's decision, this Court may only consider what was properly presented to the trial court before the trial court rendered its decision on the motion for summary disposition. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Therefore, this material may not be properly considered on appeal. *Id.* at 313 n 4.

Plaintiffs next argue that, in the absence of physical monuments along the alleged boundary, defendants have only established a boundary *point* and not a boundary *line*. At the hearing on defendants' motion for summary disposition, however, plaintiffs' counsel repeatedly referred to defendants' asserted boundary line as the "seam" in the seawall, not a mere point. Plaintiffs are correct that acquiescence cases typically involve a physical monument that defines the acquiesced boundary. See *Siegel v Renkiewicz Estate*, 373 Mich 421, 426; 129 NW2d 876 (1964), in which the edge of a concrete sidewalk defined the boundary line. See also *Renwick v Noggle*, 247 Mich 150, 151-152; 225 NW 535 (1929), in which a fence, a row of trees, hedges, and shrubbery established the boundary line. In *Walters*, *supra* at 459, a line of bushes formed the boundary line. See *Geneja v Ritter*, 132 Mich App 206, 212-213; 347 NW2d 207 (1984), in which a driveway and steel posts, which were remnants of a rotted-away wooden fence, defined the boundary line. Plaintiffs, however, fail to provide any authority to support their assertion that continuous physical markers are required to establish acquiescence. Therefore, the trial court did not err in granting defendants' motion.

The essence of acquiescence of the type asserted by defendants is that the parties have treated an agreed-upon line as the boundary between their properties. To prevail on such a claim, a party must establish the existence of an identifiable boundary line to which the parties have acquiesced. While this line must be identifiable, it does not need to be marked by continuous physical monuments. For example, in *Sackett*, *supra* at 683, this Court found that the parties had acquiesced in a property line defined as the middle of a shared driveway. In the instant case, defendants have identified a particular boundary, running in a straight line from the division in the seawalls to the deeded boundary point at the road. This line follows the "arm" or "elbow" extending landward from the seawall, which is a visually obvious marker.

Plaintiffs next assert that the trial court erred in granting defendants' motion for summary disposition because they did not have the opportunity to conduct certain discovery, including deposition of the Kresses. We note that discovery continued for more than a year and that the trial court did not hear arguments on defendants' motion until discovery was closed. Defendants listed the Kresses on the April 2002 witness list, and their affidavits were filed with the court on January 8, 2003. The hearing on defendants' motion for summary disposition was conducted on February 5, 2003. Plaintiffs simply failed to avail themselves of the opportunity to conduct further discovery. Therefore, plaintiffs' assertion that the trial court's decision was inappropriate in this regard lacks merit.

---

[1] We note that plaintiffs have not appealed the trial court's denial of their motion for reconsideration.

Finally, plaintiffs assert that the trial court erred in dismissing plaintiffs' entire complaint because defendants did not move for summary disposition on plaintiffs' nuisance claim. We agree that defendants did not move the court to summarily dismiss the nuisance claim. However, reviewing this issue pursuant to the authority provided by MCR 7.216(A)(7), we find that plaintiffs' complaint does not state a claim for nuisance upon which relief can be granted and therefore, that any error by the trial court in dismissing plaintiffs' complaint in its entirety was harmless.

The essence of a private nuisance claim is the protection of a property owner's interest in the private use and enjoyment of land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). To prevail on a nuisance claim, a party must prove a *significant harm* resulting from an *unreasonable interference* by another with that party's use or enjoyment of his property. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (emphasis in original). Plaintiffs allege that defendants' deck has created a nuisance. To the extent that plaintiffs attempt to assert a claim for trespass nuisance, such claims are only relevant to state and local governments and are not applicable in actions between private parties. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995).

Further, plaintiffs do not allege the manner or degree that defendants' conduct interferes with their use and enjoyment of lot 45. Rather, plaintiffs allege only that defendants' deck encroaches onto plaintiffs' property, and that defendants' conduct in maintaining the deck is a nuisance. Conclusory statements unsupported by factual allegations are insufficient to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Indeed, plaintiffs' claim for nuisance is premised specifically on the alleged trespass by defendants' deck. It is undisputed that plaintiffs live in a house on lot 44 and that lot 45 is vacant. As we concluded, *supra*, defendants' deck does not encroach onto lot 45, but is wholly within lot 46 as defined by the acquiesced boundary. There is no other basis in plaintiffs' complaint for the nuisance claim. Because plaintiffs do not allege that defendants' conduct has resulted in any invasion of plaintiffs' property, they fail to state a nuisance claim upon which relief can be granted. *Cloverleaf, supra* at 193.

Plaintiffs assert for the first time on appeal that the nuisance claim arises from defendants' deck obstructing their view of and access to the lake. We emphasize that plaintiffs reside on lot 44 and that lot 45 is vacant. To state a claim for nuisance, plaintiffs must allege that defendants' conduct *unreasonably* interferes with plaintiffs' use and enjoyment of lot 45. Plaintiffs' complaint does not set forth any basis for such a claim. Thus, this single assertion on appeal, again unsupported by any factual allegations and without specification as to any alleged unreasonableness, is insufficient to state a claim for nuisance. *Churella, supra*, 258 Mich App 272.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage